Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 2, 2013

CLAIM NO. 201166532

CORBETT L. DILLON PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

JACK COOPER TRANSPORT
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Corbett Dillon ("Dillon") seeks review of the opinion, award and order rendered March 21, 2013 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits enhanced pursuant to KRS 342.730(1)(c)1, temporary total disability ("TTD") benefits, and medical expenses against

Jack Cooper Transport Co., Inc. ("Jack Cooper") for a work-related November 25, 2011 low back injury. The ALJ also found Dillon sustained a work-related left shoulder injury on September 30, 2009, but determined it did not warrant an impairment rating and declined to award medical expenses. Dillon also seeks review of the April 25, 2013 order overruling his petition for reconsideration.

On appeal, Dillon argues the evidence compels a finding he is permanently and totally disabled due to his work-related low back injury. Dillon also argues he is entitled to future medical benefits for his left shoulder condition as a matter of law. We vacate in part the ALJ's analysis in denying Dillon's request for permanent total disability ("PTD") benefits and remand for further explanation and findings of fact. We likewise vacate the ALJ's decision regarding Dillon's left shoulder injury, and remand for a determination whether the injury was temporary or permanent. Likewise, we *sua sponte* vacate in part the ALJ's finding of entitlement to vocational rehabilitation benefits, and remand for a proper analysis pursuant to KRS 342.710 and controlling case law.

Dillon filed two Form 101s on August 6, 2012, alleging separate work-related injuries while employed by Jack Cooper. Dillon alleged he injured his "left shoulder/

upper extremity" on September 30, 2009 while moving a box. He alleged he injured his low back on November 25, 2011 in the course of moving a ramp. Both Form 101s indicate at the time of the injuries, Dillon was working as a car hauler/ truck driver earning approximately $1,200.00 per week. The claims were consolidated by order dated September 10, 2012.

Dillon testified by deposition on September 28, 2012 and at the hearing held January 24, 2013. Dillon was born on October 10, 1943 and resides in Olive Hill, Kentucky. He completed high school and has a commercial drivers' license. He served in the Army National Guard in the 1960s. Dillon indicated he was an engineer for years, but did not have any formal training, education or certificates. His work history also includes work as a carpenter and layout man in the construction industry, which he described as being very physical. He was also a car haul driver for Active Transportation Company from 1994 through 2008.

Dillon testified he began working as a truck driver for Jack Cooper on July 30, 2008 hauling automobiles. This position was identical to the one he previously held at Active Transportation Company. Dillon testified most of his time working for Jack Cooper was spent driving. He worked up to seventy hours a week driving up to eleven hours a day.

He also loaded and unloaded vehicles, which required him to maneuver ramps and "flippers," and chain and secure each automobile. Dillon estimated the ramps weighed approximately eighty pounds and the flippers weighed thirty-five pounds. He was also required to climb up and down ladders.

Dillon testified on September 30, 2009 as he was picking up a box, his left shoulder gave way and dropped, causing immediate pain and weakness. After returning from a work trip, Dillon sought treatment at PromptCare. He was eventually referred to Dr. Glen A. McClung II, who performed surgery in January 2010. Dillon also completed a course of physical therapy. Dr. McClung released him to return to full duty work without restriction in August 2010. He returned to Dr. McClung several months later complaining of left shoulder symptoms. No additional treatment was recommended, nor has he sought subsequent care for that condition.

Dillon testified he missed some work due to the September 2009 shoulder condition and subsequent surgery. He then returned to his job as a car hauler for Jack Cooper in August 2010 earning approximately the same wage. He continued to work full unrestricted duty until his second work injury which occurred on November 25, 2011. He

admitted he was able to perform all of his job duties, but was careful about using his left arm.

Dillon testified on November 25, 2011, he experienced stabbing pain in his low back while lifting the flipper on the back of the hauler. Dillon sought treatment at PromptCare a few days later and completed a course of physical therapy which did not alleviate his symptoms. He was then referred to Dr. James Powell, whom he saw on two occasions. Dr. Powell returned Dillon to a forty-hour work week and recommended chiropractic treatment, which did not relieve his low back symptoms. Dillon stated he is unable to return to a forty-hour work week. Regarding his work status after being released by Dr. Powell, he testified:

> A: I didn't attempt to go back to work. He sent me to a chiropractor which didn't really help, and he released me. I had to go back to see him. And when I went back the second time, he released me to go back to work and I told him I couldn't do it. And then he sent me a letter after that, that I was released to go back to work. And I called my boss and talked to him and told him I couldn't do the job. So I went in and resigned and retired because of that.

Dillon testified he had been restricted from work due to the November 2011 incident until being released by Dr. Powell in June 2012. Dillon resigned from Jack Cooper on July 9, 2012.

Dillon testified he currently experiences pain and burning in his left shoulder. He is unable to reach backward with his left arm and experiences cramping. Dillon is not receiving treatment or taking medication, and has no restriction of his left shoulder. He does not have any unpaid medical expenses associated with his left shoulder. Dillon also currently experiences daily low back pain radiating into his buttocks. He is unable to stand for prolonged periods or sit longer than forty-five minutes at a time. Dillon is neither taking any medication nor receiving any treatment for his low back.

Dillon testified he is unable to return to his former job as truck driver in his current condition. He also feels he could not return to any of his prior jobs as a carpenter due to his low back condition. Likewise, Dillon stated he is unable to work because "I can't sit for any length of time. I can't stand in one position for any length of time, and could be virtually impossible the way I have to move around now to do any kind of job."

In support of his left shoulder claim, Dillon filed records from Baptist PromptCare. On October 2, 2009, Dillon complained of left shoulder pain of three days duration after moving a box. An MRI was subsequently recommended and Dillon was restricted from work. The

October 9, 2009 left shoulder MRI demonstrated medial subluxation of the long head of the biceps tendon suggestive of a tear of the medial aspect of the transverse humeral ligament.

Dillon also submitted Dr. McClung's records. On January 4, 2010, Dr. McClung recommended a left shoulder arthroscopy after noting Dillon continued to experience pain after three months of conservative treatment. The January 29, 2010 operative report reflects Dr. McClung performed a left shoulder arthroscopy with biceps tenodesis and subacromial decompression. Post-operatively, he diagnosed left biceps tear and tenosynovitis with impingement. Dillon subsequently underwent physical therapy and continued to follow-up with Dr. McClung through July 2010. On August 5, 2010, Dr. McClung noted as follows:

> He has full range of motion 5/5 cuff strength and no pain. At this point in time, he is far enough out where I think he is at maximum medical improvement. He is able to do all his activities without any complaints. I am going to allow him to return to work full duty with no restrictions.

On January 31, 2011, Dillon returned complaining of intermittent soreness in his left shoulder. Dr. McClung determined Dillon has "AC joint arthritis" and "is suffering more than anything else from rotator cuff tendonitis." Dr.

McClung declined to recommend an MRI or any other further studies. He recommended cuff-strengthening exercises.

In support of his low back claim, Dillon filed the November 28, 2011 record from Baptist Urgent Care noting his complaint of low back pain for three days stemming from lifting a large metal part on the back of a trailer. Dillon was diagnosed with a lumbosacral strain and restricted from lifting, pulling or pushing more than five pounds. Dillon also submitted the physical therapy records from Kings Daughters Medical Center from November 30, 2011 through March 21, 2012. A lumbar MRI was performed on January 23, 2012, which revealed diffuse posterior disc bulge resulting in a mild to moderate degree of central canal and bilateral foraminal stenosis at the L3-4 and L4-5 levels. Thereafter, Dillon was referred to a neurosurgeon. Dillon also filed the chiropractic records from Elite Chiropractic reflecting treatment sessions from March 2012 through May 2012.

Jack Cooper filed Dr. Powell's records. On February 17, 2012, Dr. Powell noted the low back injury and subsequent conservative treatment. Dillon reported his inability to return to work as a long distance trucker, and continuing low back pain radiating into his pelvis. Based upon the report of the lumbar MRI, Dr. Powell concluded the mild pre-existing stenotic changes at L4-5 and L5-S1 were

not aggravated by his work-related injury. He also found "most of this is a lumbar strain or sprain" with possible pre-existing paraspinal muscle atrophy. Dr. Powell recommended chiropractic care and allowed Dillon to return to work. He further stated "I see no reason why he could not go back to sustained gainful employment in the near future." On June 7, 2012, Dr. Powell stated Dillon could return to work, no more than forty hours per week. Dr. Powell released him to unrestricted work on June 25, 2012 with no additional treatment. Dr. Powell opined if Dillon could not return to work, he should retire.

In a letter dated October 28, 2012, Dr. Powell diagnosed a lumbar strain/sprain and pre-existing degenerative changes which were not aroused by his work-related injury. He assigned a 5% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and restricted Dillon from sitting or standing more than two hours at a time.

Jack Cooper filed the job description for a driver indicating requirements of loading and unloading ramps weighing up to eighty pounds; tightening chains by pushing or pulling on a bar with force of up to one hundred pounds; climbing in and out of the truck; walking up to one mile a

day; standing; operating hand tools; driving; and lifting, pushing and pulling up to eighty pounds.

Jack Cooper also filed Dr. Thomas Loeb's November 6, 2012 report. Dr. Loeb diagnosed multilevel degenerative disc disease and osteoarthritic changes in the facet joints, which he noted was longstanding, chronic, and pre-existing, and was neither caused nor altered by his work injury. Dr. Loeb found Dillon sustained a transient soft tissue sprain of the lumbar spine due to the November 25, 2011 incident, which would have resolved within three to four weeks. He assessed a 0% impairment rating for either the low back or left shoulder pursuant to the AMA Guides, noting any current back symptoms are unrelated to the work injury. He restricted Dillon from repetitive bending, stooping or lifting greater than thirty pounds due to his pre-existing degenerative disc disease. He recommended no additional medical treatment for the low back condition.

Dr. Loeb also diagnosed a healed biceps tenodesis and subacromial decompression performed on January 29, 2010. He stated although Dillon may have sustained a left shoulder injury requiring surgical correction, he has had complete resolution of his symptoms. Dr. Loeb declined to assign permanent restrictions or recommend additional treatment for the left shoulder condition. Dr. Loeb opined Dillon "could

return to gainful employment and do the job he did before with the above restrictions in terms of his low back."

Dillon filed the August 17, 2012 report of Dr. Jules Barefoot, who diagnosed status post left arthroscopic shoulder surgery for a biceps tendon tear, and L3-4 and 4-5 disc disease. Pursuant to the AMA Guides, Dr. Barefoot assessed an 8% impairment rating for the lumbar spine condition, and a 5% impairment rating for the left shoulder condition all due to the September 30, 2009 work injury, yielding a combined 13% impairment rating. Dr. Barefoot stated Dillon may have had a pre-existing underlying degenerative disc disease in his lumbar spine at the time of his 2011 workplace injury, which was asymptomatic, dormant and non-disabling. Dr. Barefoot opined Dillon is unable to return to his job with Jack Cooper. He restricted Dillon from lifting over twenty pounds occasionally and ten pounds frequently, and sitting sixty to ninety minutes at a time before needing to move about. He also noted Dillon would have marked difficulty using his left arm above or at shoulder level, kneeling, crouching, crawling and stooping, and operating machinery with hand or foot controls. In an addendum dated November 25, 2011, Dr. Barefoot stated he disagreed with several aspects of Dr. Loeb's opinion.

The December 5, 2012 benefit review conference order, as well as the hearing transcript, reflect the parties stipulated TTD benefits were paid at a rate of $694.30 per week from October 2, 2009 through August 9, 2010 for a total of $30,846.70 for the shoulder injury and a rate of $721.97 per week from November 28, 2011 through June 1, 2012 for a total of $20,215.16 for the low back injury; and Dillon's average weekly wage was $1,234.59 for the 2009 injury and $1,240.04 for the 2011 injury. The following contested issues were noted: Work-relatedness/ causation; Injury as defined by the ACT (low back only); Exclusion for pre-existing disability/impairment; Benefits per KRS 342.730; TTD duration; vocational rehabilitation and unemployment benefits.

In the March 21, 2013 opinion, award and order, the ALJ found Dillon suffered a work-related injury to his low back and shoulder. Regarding the extent and duration of disability, entitlement to medical benefits, and entitlement to vocational rehabilitation benefits, the ALJ concluded:

> ***Benefits per KRS 342.730.*** After careful review of the conflicting medical evidence, the facts of the case and the well-reasoned arguments of the parties, I am persuaded that there is no ratable impairment for the shoulder injury and only the low back injury

warrants a permanent impairment rating. The shoulder was repaired and Plaintiff returned to work without restrictions for one and a half years until he stopped working due to the back injury. His testimony was a little inconsistent where he stated in his deposition that his shoulder was "basically fine" but testified at the formal hearing to problems he had performing his job duties upon return after shoulder surgery. This is not documented since there are no medical records to verify complaints and no evidence that Plaintiff every[sic] missed work or slowed down due to his left shoulder during the one and a half year return.

Plaintiff states that he cannot return to any work and that he is permanently and totally disabled. KRS 342.0011(11)(c) defines "permanent total disability" as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as the result of an injury. Sufficient evidence is presented that Plaintiff is unable to return to the type of work he performed at the time of the injury. Plaintiff testified that his job required him to work close to 70 hours each week and both Dr. Powell and Dr. Loeb restricted him to 40 hours per week. The job also included long hours of sitting and Dr. Powell restricted him to sitting no more than two hours at a time.

However, I am not persuaded that he has a complete and permanent inability to perform any type of work as the result of an injury. Therefore, while Plaintiff has not met his burden of proof that he is permanently totally disabled as a result of the work injury, he has met his burden of

> proving that he cannot return to the type of work he was performing at the time of the injury and, thus, the multiplier of 3 will apply to his award.
>
> Plaintiff was 68 on the date of injury. Per KRS 342.730(4), when the employee qualifies for normal old-age Social Security retirement benefits, income benefits (PPD in this case) shall terminate two years after the employee's injury.
>
> Plaintiff's award of benefits is therefore calculated as follows:
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> $1,234.59 x 2/3 = $823.05 → $541.47 (max) X 5% x .65 x 3 = $52.79 per week.
>
> ***Unpaid or Contested medical expenses.*** While there is no proof of unpaid or contested medical expenses, Plaintiff is entitled to recover from Defendant Employer all medical expenses that are reasonable and necessary for the cure and/or relief of his work-related injury to the low back. As for the shoulder injury, as no evidence has been presented of a need for treatment due to the work injury which has been found by the ALJ to have completely resolved, no medical benefits are awarded for the shoulder injury.
>
> . . . .
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> ***Vocational Rehabilitation.*** As Plaintiff has been found unable to return to his previous employment, he is entitled, per KRS 341.710[sic] to vocational rehabilitation.

In addition to the TTD benefits already stipulated by the parties, the ALJ determined Dillon was entitled to an

additional period of TTD benefits from June 1, 2012 through June 24, 2012. In the "Order and Award" section, the ALJ awarded PPD benefits in the amount of $52.79 per week from November 25, 2011 and continuing for two years with Jack Cooper taking credit for benefits already paid, and TTD benefits from June 1, 2012 through June 24, 2012. The ALJ also awarded medical benefits for Dillon's low back condition only.

Jack Cooper filed a petition for reconsideration stating Dillon is entitled to the 3.6 multiplier due to his age pursuant to KRS 342.730(1)(c)3 and the PPD benefit should be $63.36 per week. It also pointed out the manner in which the award was stated would limit Dillon's TTD benefits to only three weeks. It requested the ALJ award Dillon PPD benefits for 104 weeks from and after November 25, 2011, except for those periods in which TTD benefits are payable, and TTD benefits from November 28, 2011 through June 24, 2012, with a credit to Jack Cooper for indemnity benefits previously paid in connection with the low back injury.

Dillon also filed a petition for reconsideration agreeing with Jack Cooper's petition. In addition, Dillon argued he is permanently and totally disabled from the combined effects of his left shoulder and low back injury

when considering the factors enumerated in Ira Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2001). He argued substantial evidence supports an award of PTD benefits, or in the alternative, requested additional findings of fact addressing the factors set forth in Ira Watson Dept. Store v. Hamilton, supra. Dillon also requested an additional finding he is entitled to past and future medical expenses for his left shoulder condition.

In the April 25, 2013 order, the ALJ sustained in part the parties' requests, amending the Award as follows:

> **IT IS HEREBY ORDERED** Plaintiff is entitled to the 3.6 multiplier under KRS 342.730(1)(c)3. Plaintiff's weekly PPD benefits are $63.36 for 104 weeks beginning November 26, 2011, except for weeks in which Plaintiff is entitled to TTD benefits. Additionally, Plaintiff is entitled to TTD benefits at the rate of $721.97 per week for the period of November 28, 2011 through June 24, 2012 with Defendant Employer taking credit for benefits already paid.

The ALJ overruled the remainder of Dillon's petition as "simply a reargument of the merits of the claim."

On appeal, Dillon argues the evidence compels a finding he is "permanently and totally occupationally disabled as a result of his November 25, 2011 work-related back injury." He also argues the ALJ "failed to follow the law and assess of [sic] Mr. Dillon's occupational loss

based on the lay and evidence [sic] and entered a conclusory finding." Dillon points to the statutory definitions applicable to an award of PTD benefits as well as Ira Watson Dept. Store v. Hamilton, supra. Dillon argues the ALJ failed to consider several factors, including his age, education, work history, physical limitations, and restrictions assessed by Drs. Powell and Barefoot.

Dillon also argues he is entitled to future medical benefits as a matter of law for his work-related left shoulder injury. Dillon notes medical benefits are appropriate upon a finding of "disability," and evidence of a permanent disability rating is not required. Dillon noted the ALJ found he suffered a work-related left shoulder injury requiring surgery, and his testimony establishes he continues to experience symptoms. Therefore, "it was an error of law not to award past and future reasonable and necessary medical treatment pursuant to KRS 342.020 and applicable case law."

Dillon, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of his cause of action before the ALJ, including the extent and duration of any disability generated by the work injury alleged, and entitlement to

future medical expenses. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Dillon was unsuccessful in his burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal.

Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, supra.

With that said, the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the claim was remanded to the ALJ "for

further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

We find the ALJ failed to set forth adequate findings of fact and explanation which would allow meaningful review regarding her conclusion Dillon is not permanently totally disabled due to his work-related injuries. PTD is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store, 34 S.W.3d at 51, in determining whether a claimant is permanently and totally disabled:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently

> under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

In this instance, the ALJ provided only the conclusory statement "I am not persuaded that he has a complete and permanent inability to perform any type of work as the result of an injury" in support of the determination Dillon is not permanently totally disabled. Significantly, the ALJ declined to make additional findings of fact regarding this issue in the order on reconsideration, despite Dillon's specific request.

On remand, the ALJ is directed to conduct an analysis in accordance with the statutory and case law referenced above and provide with more specificity the rationale supporting her determination regarding whether Dillon is permanently totally disabled due to his work injuries. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Although there may be

substantial evidence in the record to support an ultimate determination Dillon is not permanently and totally disabled, the ALJ must provide an adequate explanation of the basis for her decision.

Next, we find the ALJ erred in failing to specifically find whether the work incident resulted in a permanent or temporary left shoulder injury. In the March 21, 2013 opinion, it appears the ALJ found Dillon sustained a work-related left shoulder injury, but concluded "there is no ratable impairment" for this condition. Further, in declining to award medical expenses, the ALJ found no evidence supporting a need for treatment due to the work injury, and determined the left shoulder condition has "completely resolved."

However, based on the clear language in KRS 342.0011(1), an "injury" does not require a *permanent* "harmful change in the human organism." KRS 342.0011(1) defines "Injury" as follows:

> [A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

The above definition does not require a *permanent* injury. Temporary disabling conditions, as defined in KRS

342.0011(11)(a), are still injuries pursuant to KRS 342.0011(1).

In Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the ALJ determined the claimant failed to prove more than a temporary exacerbation and also sustained no permanent disability as a result of this injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> In other words, the ALJ concluded that the claimant suffered a work-related injury but that its effect was only transient. It resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Id. at 286.

Since the rendition of Robertson v. United Parcel Service, supra, this Board has consistently held it is possible for an injured worker to establish a temporary injury for which TTD and temporary medical benefits may be paid, but yet fail in his or her burden of proving a permanent harmful change to the human organism for which permanent benefits are authorized. Further, pursuant to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the ALJ may award future medical benefits despite the lack of a permanent impairment rating after providing sufficient reasons for the award.

The ALJ made no findings regarding whether Dillon sustained a temporary left shoulder injury. Therefore, the claim must be remanded for a specific finding of whether the shoulder injury is permanent or temporary in nature. If the ALJ does in fact conclude Dillon sustained a temporary work-related shoulder injury, she is required to make additional findings as to entitlement to any temporary medical benefits.

Finally, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Although neither party raised this issue on appeal, KRS 342.285 clearly grants the Board the

authority to decide questions of law regardless of whether raised by any party. Within the Board's province on appeal is to assure orders and awards of an ALJ are in conformity with Chapter 342. In this case, the ALJ's award is not in conformity with the law.

With regard to vocational rehabilitation, we believe the ALJ's analysis is inadequate because she failed to specifically provide a basis for entitlement to this relief, and we therefore vacate. KRS 342.710 states:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment, and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

The Kentucky Court of Appeals in Wilson v. SKW Alloys, 893 S.W.2d 800 (Ky. App. 1995) noted a purpose of this statute is to expeditiously restore the injured worker as near as possible to a condition of self-support as an able bodied worker, and further held "work for which an

employee has previous training or experience" must be suitable employment. The Court defined "suitable employment" work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of the injury, his age and education, his income level and earning capacity, his vocational aptitude, his mental and physical abilities and other relevant factors, both at the time of injury and after reaching his post-injury maximum level of medical improvement. Id. at 802.

On remand, the ALJ is instructed to conduct an analysis in accordance with the above-referenced statutory and case law outlining why this relief is appropriate, especially in light of the fact he is nearly seventy years old and has retired. Again, the Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra. Although there may be substantial evidence in the record to support an award of vocational rehabilitation benefits, the ALJ must set forth the proper analysis.

Accordingly, the March 21, 2013, opinion, award and order and the April 25, 2013 order on reconsideration are **AFFIRMED IN PART, VACATED IN PART,** and **REMANDED** for

entry of an amended opinion and order in conformity with the views expressed herein.

ALL CONCUR.

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